IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

NO.

UNITED STATES OF AMERICA

v.

CHARLES L. SOBER,
RICHARD W. HEINEMAN,
JOHN E. CYPHER,
JACK C. REESE,
IRA L. SOBER,
Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND APPENDICES

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INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Statutory and Procedural Rules Provisions Involved	4
Statement of the Case	6
Reasons for Granting the Writ	8
I. The convictions of Charles L. Sober, Richard W. Heineman and John E. Cypher under 18 U. S. C. § 220, were not sufficiently supported by evidence that they received a commission or thing of value for using their influence to procure loans from The Old Freeport Bank where they were directors and or officers for certain borrowers	8
II. The convictions of Charles L. Sober, Richard W. Heineman and John E. Cypher under 18 U. S. C. § 371, were not sufficiently supported by evidence that they conspired to obtain commissions from borrowers to procure loans for them from The Old Freeport Bank at a time when they were directors and or officers of said bank	15
III. The convictions of Charles L. Sober, Jack C. Reese and Ira L. Sober under 18 U. S. C. § 1005, wherein it was claimed that they made false entries on the books of The Old Freeport Bank and on various call reports by listing certain mortgages as F. H. A. insured mortgages when said mortgages, in fact, were not insured were not sufficiently supported by evidence	23
IV. The convictions of Jack C. Reese and Ira L. Sober under 18 U. S. C. § 1005, where it was claimed that they made a false entry on the books of The Old Freeport Bank when an item of $725.00 was carried in the cash items account for a period of six weeks were not sufficiently supported by evidence	28

PAGE

V. Due process was violated because of the improper conduct of Government counsel; the introduction into evidence of subsequent events outside the scope of the indictment; the restriction of defense testimony; and the recanting of testimony by prime Government witnesses 30

VI. Due process was violated because Jack C. Reese and Ira L. Sober were forced to be tried together with the other petitioners on unrelated charges 48

VII. A Court of Appeals may not refuse to interpret a United States Statute where there has been a conviction under said statute and the question of the applicability of said statute is raised 50

Conclusion 51

Appendix A—Opinion of the Court Below 52

Appendix B—Concurring Opinion of the Court Below 67

Appendix C—Judgments of the Court Below 68

Appendix D—Order of the Court Below Extending time within which to file petition for Rehearing 73

Appendix E—Order of the Court Below Sur Petition for Rehearing 74

CASES CITED

Alford v. U.S., 282 U.S. 687 (1931) 46

Beck v. U.S., 33 F. 2d 107 (8th Cir. 1929) 42

Berger v. U.S., 295 U.S. 78 (1935) 39, 40, 43, 44

Blumenthal v. U.S., 332 U.S. 539, 559 18

Callenger v. U.S., 50 F. 2d 345 (7th Cir. 1931) 46

Cochran v. U.S., 157 U.S. 286 (1895) 30

Evans v. U.S., 257 F. 2d 121 (C.A. 9th 1958) 16

PAGE

Ginsberg v. U.S., 257 F. 2d 95 (C.A. 5th 1958) 44

Handford v. U.S., 249 F. 2d 295 (C.A. 5th 1957); .... U.S. .... (Unpublished Opinion) 40, 41

Krulewitch v. U.S., 336 U.S. 440, 69 S. Ct. 716, (1949) 17, 18, 19

McIlroy v. U.S., 164 U.S. 76 (1896) 49

Read v. U.S., 42 F. 2d 636 (8th Cir. 1930) 43

Rent v. U.S., 209 F. 2d 893 (C.A. 5th 1954) 16

Schaffer v. U.S., 80 S. Ct. 945 (May 16, 1960) 49

Skidmore v. Baltimore & Ohio Railroad Company, 167 F. 2d 54 18

U.S. v. Falcone, 109 F. 2d 579 (2d. Cir. 1940) 19, 20

U.S. v. Fish, 24 F. 585 (CCNY 1885) 30

U.S. v. Frankfeld, 38 F. Supp. 1018 (D. Ct. D.C., 1941) 49

U.S. v. Marachowsky, 213 F. 2d 235 (7th Cir. 1954) 48

U.S. v. Scoblick, 124 F. Supp. 881, affirmed 225 F. 2d 779 (C.A. 3rd 1955) 25

U.S. v. Spangelet, 258 F. 2d 338 (C.A. 2d 1958) 41, 42

U.S. v. Stirone, 80 S. Ct. 270 (1960) 44

Viereck v. U.S., 318 U.S. 236 (1943) 44

Wagner v U.S., 263 F. 2d 877 (C.A. 5th 1959) 44

STATUTES CITED

United States Constitution, Amendment V 48

18 U. S. C. § 220 ..... 12, 13, 14, 48, 49, 50

18 U. S. C. § 371 ..... 15, 16, 48, 49

18 U. S. C. § 1005 ..... 23, 28

Federal Rules of Criminal Procedure, Rule 14 50

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit affirming the judgment of the United States District Court for the Western District of Pennsylvania, which had adjudged petitioners guilty of violating Title 18 U.S.C. 220, 371 and 1005.

OPINIONS BELOW

The Opinion of the District Court has not yet been reported, but appeared at P. 390a of Appellants' Appendix in the Court of Appeals. The following Opinions of the Court of Appeals have not yet been reported

but appear where respectively indicated in the Appendix to this petition:

Opinion of the Court of Appeals affirming conviction (Appendix A);

Concurring Opinion of Chief Judge Biggs and Circuit Judge Hastie (Appendix B).

JURISDICTION

The judgment of the Court of Appeals was entered on June 24, 1960.[1] On June 30, 1960, the time for filing a Petition for Rehearing was extended to July 18, 1960.[2] The Petition for Rehearing was filed on July 14, 1960, and was denied on July 22, 1960.[3] Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I

Were the convictions of Charles L. Sober, Richard W. Heineman and John E. Cypher under 18 U.S.C. § 220, sufficiently supported by evidence that they received a commission or thing of value from certain borrowers for using their influence to procure loans from The Old Freeport Bank where they were directors and/or officers?

II

Were the convictions of Charles L. Sober, Richard W. Heineman and John E. Cypher under 18 U.S.C. § 371, sufficiently supported by evidence that they conspired

1. Appendix C.
2. Appendix D.
3. Appendix E.

to obtain commissions from borrowers to procure for them loans from The Old Freeport Bank at a time when they were directors and/or officers of said bank?

III

Were the convictions of Charles L. Sober, Jack C. Reese and Ira L. Sober under 18 U.S.C. § 1005, sufficiently supported by evidence that they made false entries on the books of The Old Freeport Bank by listing various mortgages as F.H.A. insured mortgages when said mortgages were not, in fact, insured?

IV

Were the convictions of Jack C. Reese and Ira L. Sober under 18 U.S.C. § 1005, sufficiently supported by evidence that they made a false entry on the books of The Old Freeport Bank when an item of $725.00 was carried in the cash items account for a period of six weeks?

V

Was due process violated because of the improper conduct of Government counsel; the introduction into evidence of subsequent events outside the scope of the indictment; the restriction of defense testimony; and the recanting of testimony by prime Government witnesses?

VI

Was due process violated because Jack C. Reese and Ira L. Sober were forced to be tried together with the other petitioners on unrelated charges?

VII

May a Court of Appeals refuse to interpret a United States statute where there has been a conviction under said statute and the question of the applicability of said statute is raised?

CONSTITUTIONAL, STATUTORY AND PROCEDURAL RULES PROVISIONS INVOLVED

The following constitutional, statutory and procedural rules provisions are relevant:

1. United States Constitution, Amendment V:

> ". . . nor (shall any person) be deprived of life, liberty, or property, without due process of law; . . ."

2. 18 U.S.C., § 220:

> "Whoever, being an officer, director, employee, agent, or attorney of any bank, the deposits of which are insured by the Federal Deposit Insurance Corporation or a Federal intermediate credit bank, or of a National Agricultural Credit Corporation, except as provided by law, stipulates for or receives or consents or agrees to receive any fee, commission, gift, or thing of value, from any person, firm or corporation, for procuring or endeavoring to procure for such person, firm or corporation, or for any other person, firm, or corporation, from any such bank or corporation, any loan or extension or the purchase or discount or acceptance of any paper, note, draft, check, or bill of exchange by any such bank or corporation, shall be fined not more than $5,000 or imprisonment not more than one year or both."

3. 18 U.S.C. § 371:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both. If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

4. 18 U.S.C., § 1005:

"Whoever makes any false entry in any book, report, or statement of such bank with intent to injure or defraud such bank, or any other company, body politic or corporate, or any individual person, or to deceive any officer of such bank, or the Comptroller of the Currency, or the Federal Deposit Insurance Corporation, or any agent or examiner appointed to examine the affairs of such bank, or the Board of Governors of the Federal Reserve System . . ."

5. Federal Rules of Criminal Procedure, Rule 14.:

"If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires."

STATEMENT OF THE CASE

This is an appeal from the judgment and commitment of the United States District Court for the Western District of Pennsylvania entered on the 24th day of September, 1959, convicting petitioners Richard W. Heineman of violating 18 U.S.C. § 220 and 371, Charles L. Sober of violating 18 U.S.C. § 220, 371 and 1005, John E. Cypher of violating 18 U.S.C. § 220 and 371, Ira L. Sober of violating 18 U.S.C. § 1005, and Jack C. Reese of violating 18 U.S.C. §1005, affirmed by the Court of Appeals for the Third Circuit.

On April 14, 1959, the trial on all indictments commenced before Judge John L. Miller and a jury. At the close of the Government's case, counsel for petitioners moved the Court to enter judgment of acquittal for all petitioners on all charges. After arguments by counsel for both sides, the Court granted motions for acquittal on behalf of Richard W. Heineman on two counts, on behalf of Charles L. Sober on two counts, on behalf of Ira L. Sober on two counts, and on behalf of Jack C. Reese on three counts.

At the conclusion of the petitioners' case, counsel for petitioners moved for judgment of acquittal for all petitioners on all the remaining counts, which the Court denied. Thereafter the jury returned a verdict finding Richard W. Heineman not guilty on four counts, Charles L. Sober not guilty on two counts, Ira L. Sober not guilty on one count. A verdict of guilty was returned on the remaining counts.

Motions for acquittal or in the alternative, motions for a new trial were filed on behalf of petitioners. On

July 15, 1959, oral argument was had on the aforesaid motions before the Honorable John L. Miller. On August 10, 1959, counsel for petitioners filed a motion for new trial on the ground that Government witnesses had recanted their previous testimony. A hearing on said motion took place on August 26, 1959.

On September 16, 1959, the Court entered an Order directing that the Motion for Acquittal filed on behalf of Charles L. Sober as to the eighth count of the indictment at No. 15664 be granted, and that the Motion for Acquittal on behalf of all petitioners on all other counts, and the Motion for a New Trial, be denied. A Supplemental Opinion was also filed that day by the Court, denying the petitioners' Motion for a New Trial because of new evidence.

On September 24, 1959, petitioners appeared for sentencing and were duly sentenced by the District Court. On September 28, 1959, notice of appeal was filed. On April 19, 1960, argument was held on these cases before the United States Court of Appeals and on June 24, 1960, the United States Court of Appeals rendered its Opinion and judgment affirming the convictions.

Thereafter, an extension of time having been granted within which to file a petition for Rehearing, the Petition was filed on July 14, 1960, and refused by the Court of Appeals on July 22, 1960.

REASONS FOR GRANTING THE WRIT

Before we proceed with the argument in this case, counsel for the petitioners beg the indulgence of this Court. Of necessity, we are compelled to make this Petition longer than we would like to see it. This is a case where many unrelated charges were lumped together with manifold conspiracy counts, so much so that on seven of the counts, motions for acquittal were granted before the case was concluded, and on one afterwards. We will attempt as briefly as the exigencies of this case demand, to unfold, step by step, the raveled involvements of this case.

I.

The convictions of Charles L. Sober, Richard W. Heineman and John E. Cypher under 18 U.S.C. § 220, were not sufficiently supported by evidence that they received a commission or thing of value for using their influence to procure loans from The Old Freeport Bank where they were directors and/or officers for certain borrowers.

The jury returned a verdict of guilty on the charges under 18 U.S.C. § 220, against Richard W. Heineman on two cases which will be referred to as the Gallagher case and the Burkett case, against John E. Cypher on the case referred to as the Heyman case, and against Charles L. Sober on all three of these cases.

The Gallagher case, basically, represented a loan made in September, 1953, by The Old Freeport Bank to Mr. and Mrs. Gallagher in the amount of $17,000. Mr. Gallagher, the owner of an inn, desiring to buy out

his partner, approached The Old Freeport Bank for a loan of $15,000 or $16,000. The request for the loan was made with the Loans Committee of the Bank and with some of the members of the Board of Directors, (C. A. Appendix 20a, 21a, 228a, 254a) which decided that the maximum loan they could make to Gallagher was between $9,000 and $10,000. Gallagher, needing more money, asked Sober if he could suggest someone to help him, and Sober suggested Dr. Richard W. Heineman, one of the petitioners, who was a director of the Bank. Mr. Gallagher apprised Dr. Heineman of his needs and Dr. Heineman, for a consideration of $2,000 agreed to furnish the collateral to be posted with the Bank in order for Gallagher to obtain a sufficient amount of money to cover all his needs. This resulted in Dr. Heineman furnishing to the Bank a Certificate of Deposit of $8,000, and Gallagher obtained a $17,000 loan. The Bank never loaned Gallagher any more money than the Loans Committee originally agreed to lend him on his own collateral and took no additional risks.

It is obvious from the face of the transaction and the records of the Bank that neither pressure nor influence allegedly used either by Dr. Heineman or Mr. Sober had anything to do with the granting of this loan.

The relevant testimony of all witnesses on this question is presented for review because it is submitted to the Court that the testimony taken in a light most favorable to the Government's position fails to support the charge of violating 18 U.S.C. § 220 (C. A. Appendix 17a-65a, 176a-180a, 213a-217a, 226a-232a, 276a-282a, 291a-293a).

The Burkett transaction took place in the following manner although there is a dispute in the testimony. However, for purposes of this Petition, we will proceed to consider the testimony in a light most favorable to the

Government's contentions. The Burketts came to The Old Freeport Bank October, 1954 and saw Mr. Charles L. Sober, and informed Mr. Sober that they owed a substantial amount of money, were delinquent in payments, and wished to consolidate all their debts; were concerned about losing their home because they had a first and second mortgage and a number of other judgments, and the creditors were pressing them. During the conversation, the Burketts allegedly mentioned that Dr. Heineman was their physician and Mr. Sober allegedly told them to go up and see the doctor. The Burketts had a meeting with Dr. Heineman at his office, at which time they requested him to help them. Dr. Heineman told them that they were poor credit risks and that if he would supply money for them, it would be necessary that they pay him for the risk involved, which they agreed to do. There is a dispute as to whether or not the agreed-upon payment for the risk was spelled out in a particular amount. In any event, the ultimate payment was $800, and the Burketts borrowed $5,900. The question of the loan to the Burketts was discussed with the Loans Committee of the Bank as well as with the various members of the Board of Directors, (C. A. Appendix 234a, 238a), which concluded that the Bank would not lend them $5,900, unless some additional collateral would be posted to protect the Bank. Dr. Heineman agreed to put up whatever collateral the Loans Committee would require. In fact, Dr. Heineman put up $3,000 in the form of a Certificate of Deposit which was assigned to the Bank as additional collateral to support the loan.

The records of the Bank disclose without question that a $5,900 loan was made to the Burketts and that Dr. Heineman placed $3,000 in the form of a Certificate

of Deposit with the Bank. At the time the proceeds were distributed, Dr. Heineman received $800. The Government contends that the $800.00 received by Dr. Heineman was a gift or a commission for his procuring the loan. A reading of the testimony reveals that without the Certificate of Deposit, the loan would not have been made in the amount of $5,900, but would have been made only to the extent of $2,900. (C. A. Appendix 66a-105a, 232a-240a, 249a-254a, 282a-290a, 293a-294a)

The Heyman transaction started when Mr. Heyman built a greenhouse and accumulated approximately $23,000 or more of debts. He was being pressed by his creditors and approached a great number of individuals as well as financial institutions in an attempt to raise the $23,000 so that he could stay in business. Mr. Heyman in March, 1957, also asked Charles L. Sober at The Old Freeport Bank for a loan of $23,000. At that time, Mr. Heyman had a G. I. Mortgage with the Bank, and also a chattel mortgage. The request was submitted to the Board of Directors and the Loans Committee and the decision was that the most the bank would lend Mr. Heyman on his own collateral was $13,000. Heyman could not meet his obligations with that amount of money. (C. A. Appendix 124a-125a, 130a-131a, 242a-243a) He then contacted John E. Cypher and after a great number of conferences with Mr. Cypher, agreed with Mr. Cypher that if Mr. Cypher would guarantee a loan in the amount of $23,000 to Mr. Heyman, that Mr. Heyman would be willing to pay Mr. Cypher an additional $23,000 out of the profits of his business. Heyman then obtained a loan from The Old Freeport Bank in the amount of $46,000. From the proceeds of the $46,000, $23,000 was placed in a Certificate of Deposit and as-

signed as collateral to support the loan, and Mr. Cypher placed a personal Certificate of Deposit in the amount of $10,000, to further secure the loan. Again the Bank's risk amounted to a total of $13,000, being the same amount that the Bank had formerly agreed to lend Mr. Heyman. The Government alleges that Mr. Cypher, aided and abetted by Mr. Charles L. Sober, obtained a commission of $23,000 by having the Bank grant Mr. Heyman a loan of $46,000.

The Testimony clearly shows that Mr. Cypher placed his own $10,000 in jeopardy to back up the loan to Mr. Heyman, and in addition thereto, agreed to give Mr. Heyman help in running the financial end of his business as well as supplying him with working capital, in all of which negotiations, the Bank had no part. For all his troubles in this matter, Mr. Cypher lost his Certificate of Deposit in the sum of $10,000, and never received the alleged commission of $23,000 because Mr. Heyman went into bankruptcy within a short period after this transaction. (C. A. Appendix 123a-145a, 184a-188a, 241a-246a, 260a-274a)

The Act of Sept. 21, 1950, C. 967, 64 Stat. 894, 18 U.S.C. 220 states:

> "Whoever, being an officer, director, employee, agent, or attorney of any bank, the deposits of which are insured by the Federal Deposit Insurance Corporation, or a Federal intermediate credit bank, or of a National Agricultural Credit Corporation, except as provided by law, stipulates for or receives or consents or agrees to receive any fee, commission, gift, or thing of value, from any person, firm or corporation, for procuring or endeavoring to procure for such person, firm, or corporation, or

for any other person, firm, or corporation, from any such bank or corporation, any loan or extension or renewal of loan or substitution of security, or the purchase or discount or acceptance of any paper, note, draft, check, or bill of exchange by any such bank or corporation, shall be fined not more than $5,000 or imprisonment not more than one year or both."

Counsel for the petitioners submit that as a matter of law, all the testimony, taken in the light most favorable to the Government, fails to prove a violation of the above quoted section. The purpose of this section is the crux of the entire case. The Court of Appeals for the Third Circuit refused to interpret this section even though requested to do so in the first appeal as well as in the petition for rehearing. A search of the Congressional Record at the time that this section of the Code was adopted fails to clarify the question. The practical-sense approach in determining the purpose of Section 220 is that the public is opposed to self-enrichment by directors of a bank to the detriment of depositors. Were the loans in the present case induced by the use of influence by Mr. Sober, Dr. Heineman or Mr. Cypher in an attempt to enrich themselves at the expense of the depositors? It is submitted that the evidence is to the contrary. The undisputed facts are that in each of the three cases, the Loans Committee which consisted of people other than and in addition to the three named petitioners, passed upon the amount that the Bank would lend. In all three cases, the eventual risk of the Bank was the same, if not less, than what the Loans Committee authorized the Bank to lend the named individuals.

A search of the law of the United States fails to reveal any case which has any similarity to the case now being presented to the Court. This is a case of first impression, either because it has never arisen before or if such circumstances have occurred before, the Governmental agencies have felt that no crime was committed. The statute under which three of the petitioners are being prosecuted does not prohibit a bank director from placing his personal funds in jeopardy and charging a fee for so doing. The Government attempts to overcome the fact of the personal collateral placed by petitioners Heineman and Cypher with the Bank and claims such action was merely a camouflage and that the true purpose was to use their influence and to charge a commission for obtaining a loan. This argument flies in the face of reality. No one disputes that the three borrowers were bad financial risks. In the event that they defaulted, Dr. Heineman and Mr. Cypher would be the only losers. If these loans were obtained by Dr. Heineman, Mr. Cypher and Mr. Sober through influence because of their positions with the Bank, there would have been no necessity for putting up collateral in the large sums of money assigned to the Bank. The argument of camouflage is inapposite because the testimony shows that the deals were openly set forth on the books of the Bank. The payments to Dr. Heineman were by check and his name appears on the checks, and in Mr. Cypher's case, the Certificate of Deposit was made out in his name, and all details of the transactions are boldly set forth on the records of the bank. There was no attempt to hide or conceal anything.

The conviction of Charles L. Sober, Richard W. Heineman and John E. Cypher under 18 U.S.C. §220

cannot be supported. From the evidence presented, the petitioners have been convicted for activites which are not proscribed by any statute of the United States. See *U. S. v. Gerken*, 182 F. Supp. 738 (1960). Such a conviction denies them the due process of law fundamental to the protection of the rights of all citizens.

II.

The convictions of Charles L. Sober, Richard W. Heineman and John E. Cypher under 18 U.S.C. § 371, were not sufficiently supported by evidence that they conspired to obtain commissions from borrowers to procure loans for them from The Old Freeport Bank at a time when they were directors and/or officers of said bank.

In the three cases (Gallagher, Burkett and Heyman) referred to in the prior point, petitioners' Charles L. Sober and Richard W. Heineman, in addition to being charged with violating Section 220, were also charged with conspiracy in both the Gallagher and Burkett cases. Mr. Sober and Mr. Cypher were further charged with conspiracy in the Heyman transaction. The Act of June 25, 1948, C. 6.45, 62 Stat. 701, 18 U.S.C.A. 371:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both. If, however, the offense, the commission

> of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

The identical evidence produced under the substantive charge (Section 220) was urged by the Government to sustain the conspiracy charges. Why should the two petitioners charged with a substantive offense be likewise charged with conspiracy? Basically, this procedure is more questionable where the overt acts relied on in the conspiracy charges are the identical acts which are used to prove the substantive charge against the same petitioners. The reason is obvious. A shotgun approach has been taken in this case in patent violation of petitioners' right to a fair and impartial trial.

A conspiracy charge requires that there be an agreement between two or more individuals, that there be an offense object, and an overt act. 15 C. J. S., Conspiracy § 93. The evidence considered in the light most favorable to the Government, fails to show any agreement between Dr. Heineman and Mr. Sober, or between Mr. Sober and Mr. Cypher. The Government may stretch their legal imagination and argue that proof of an agreement is difficult to obtain and therefore only slight evidence is needed to meet that burden. However, this is a criminal case and any attempt to weave implications and inferences into mosaic to prove an agreement, must be closely scrutinized. The evidence fails to reveal any agreement whatsoever between the parties. *Rent v. U. S.* 209 F. 2d 893 (C. A. 5th 1954); *Evans v. U. S.* 257 F.2d 121 (C.A. 9th 1958).

The conspiracy charge was used, it is submitted, because the Government could thereby put into evidence testimony which would be improper as to the substantive charge. One of the primary purposes of the conspiracy charges was to permit the government to introduce declarations made by one of the petitioners to a third person, even though the other petitioner would not be present. This cannot be done in the substantive charge, but it can be done in the conspiracy charge. The petitioners were placed in the position of having testimony introduced against them which would be improper in the substantive charge. This is the type of case that caused Justice Jackson such anxious concern as outlined in his concurring Opinion in the case of *Krulewitch v. United States*, 336 U. S. 440, 69 S. Ct. 716 (1949), joined in by Mr. Justices Frankfurter and Murphy. Mr. Justice Jackson was concerned with the tendency of Government prosecutors to indict individuals for conspiracy, in addition to substantive offenses, which he thought constituted a serious threat to the fairness of administering justice. He states:

> "The interchangeable use of conspiracy doctrine in civil as well as penal proceeding opens it to the danger, absent in the case of many crimes, that a court having in mind only the civil sanctions will approve lax practices which later are imported into criminal proceedings. . . . One might go on from the reports of this and lower courts and put together their decisions condoning absence of proof to demonstrate that the minimum of proof required to establish conspiracy is extremely low, and we may expect our pronouncements in civil cases to be followed in criminal ones also."

"When the trial starts, the accused feels the full impact of the conspiracy strategy. Strictly, the prosecution should first establish Prima Facie the conspiracy and identify the conspirators, after which evidence of acts and declarations of each in the course of its execution are admissible against all. But the order of proof of so sprawling a charge is difficult for a judge to control. As a practical matter, the accused often is confronted with a hodgepodge of acts and statements by others which he may never have authorized or intended or even known about, but which help to persuade the jury of existence of the conspiracy itself. In other words, a conspiracy often is proved by evidence that is admissible only upon assumption that conspiracy existed. The naive assumption that prejudicial effects can be overcome by instructions to the jury, Cf. Blumenthal v. United States, 332, U. S. 539, 559, *all practicing lawyers know to be unmitigated fiction.* See Skidmore v. Baltimore & Ohio Railroad Company, 167 F. 2d 54."

"There is, of course, strong temptation to relax rigid standards when it seems the only way to sustain convictions of evildoers. But statutes authorize prosecution for substantive crimes for most evil-doing without the dangers to the liberty of the individual and the integrity of the judicial process that are inherent in conspiracy charges. We should disapprove the doctrine of implied or constructive crime in its entirety and in every manifestation. And I think there should be no straining to uphold any conspiracy conviction where prosecution for the substantive offense is adequate and the purpose

served by adding the conspiracy charge seems chiefly to get procedural advantages to ease the way to conviction."

"Although a reversal after four trials is, of course, regrettable, I cannot overlook the error as a harmless one. But I should concur in reversal even if less sure that prejudice resulted, for it is better that the crime go unwhipped of justice than that this theory of implied continuance of conspiracy find lodgment in our law, either by affirmance or by tolerance. Few instruments of injustice can equal that of implied or presumed or constructive crimes. The most odious of all oppressions are those which mask as justice." (Emphasis supplied)

The charges against the petitioners under the conspiracy doctrine and also the charges against Charles L. Sober as aiding and abetting are without merit. The convictions were based not upon substantive evidence but upon the type of hearsay evidence which, if this had been a conspiracy trial without substantive charges, or vice versa, would not have been admissible. Judge Learned Hand, in his Opinion in the case of *U.S. v. Falcone*, 109 F. 2d 579, (2d Cir. 1940) states the proposition clearly and distinctly as follows:

"There are indeed instances of criminal liability of the same kind, where the law imposes punishment merely because the accused did not forbear to do that from which the wrong was likely to follow; but in prosecutions for conspiracy or abetting, his attitude towards the forbidden undertaking must be more positive. It is not enough that he does not forego a normally lawful activity, of the fruits of

which he knows that others will make an unlawful use; he must in some sense promote their venture himself, make it his own, have a stake in its outcome. The distinction is especially important today when so many prosecutors seek to sweep within the drag-net of conspiracy all those who have been associated in any degree whatever with the main offenders. That there are opportunities of great oppression in such a doctrine is very plain, and it is only by circumscribing the scope of such all comprehensive indictments that they can be avoided. We may agree that morally the defendants at bar should have refused to sell to illicit distillers; but, both morally and legally, to do so was toto coelo different from joining with them in running the stills." P. 581.

The requirements concerning the type and manner of proof which must be furnished to substantiate a conspiracy charge is set forth in *Harvard Law Review*, Vol. 72, No. 5, Page 922:

"Requirement of Independent Proof.—*The final requirement of the coconspirator rule is that, before that statement of a coconspirator will be admissible, the prosecution must present proof of the existence of the conspiracy which is based on independent evidence, or, as some courts put it, a prima facie case of conspiracy.* A literal reading of this requirement would force upon the prosecution a difficult task in the presentation of evidence. In view of this problem, courts have relaxed the normal requirements for the order of proof, provisionally admitting evidence falling under the coconspirator rule, subject to a later instruction by the court to

disregard it against all but the declarant if independent proof of the conspiracy has not been presented. In view of the doubtful efficacy of an instruction to disregard previously presented evidence, the requirement of independent proof provides only a limited safeguard to the defendant. Moreover, many courts seem to find a prima facie case on extremely weak evidence. The danger also exists that such provisionally admitted evidence will itself be used to support the prima facie case, and thus 'hearsay would lift itself by its own bootstraps to the level of competent evidence.' Despite the logical inconsistency of such an approach, several courts have approved the practice. In these jurisdictions, the requirement of independent evidence is virtually meaningless." (Emphasis supplied)

The one element that there is no question about is that wrongful intent must be proved in the conspiracy charges. As a matter of fact, the Government did not attempt to prove such during the trial, as the evidence reveals. Perhaps the following quote states the contention of the petitioners in a most striking manner:

"Wrongful Intent—A question of more practical significance than whether the intent in the crime of conspiracy is specific is whether it need be wrongful, that is, whether any mens rea need be shown at all. *The view which has won general acceptance in this country was first proposed in People v. Powell and was later well expressed by Justice Qua in Commonwealth v. Benesch: 'In the case of conspiracy, as with other common law crimes, it is necessary that criminal intent be shown. Speaking in general terms, there must be an intent to do*

wrong.' If the act that is conspired to is malum in se, this intent merely requires knowledge of the relevant facts, so that the parties know what they are planning; but if it is an act not wrongful in itself and merely made unlawful by statute, the requisite intent to do wrong does not exist without knowledge that the contemplated acts violate the law. Therefore, even when the commission of a particular substantive offense does not require scienter, conspiracy to commit that offense does. Such a view seems consistent with the general-danger rationale of conspiracy, since it is difficult to say that a grouping is inherently antisocial and poses a continuing threat merely because a contemplated act which it thinks to be lawful is in fact unlawful. It may be argued that if the group plans such an act once, it may do so again, and so does constitute a continuing danger. But merely informing the group of the illegality of its object, rather than invoking the severe sanction of criminal punishment, may be all that is necessary to end such danger. If this is not effective, then the group in its subsequent activity will possess the requisite scienter, and so will be antisocial and punishable as a conspiracy." (Emphasis supplied)

A review of the evidence presented to substantiate the conspiracy charges reveals that the Government has not proven the necessary elements, and the conspiracy charges must fall.

III.

The convictions of Charles L. Sober, Jack C. Reese and Ira L. Sober under 18 U.S.C. § 1005, wherein it was claimed that they made false entries on the books of The Old Freeport Bank and on various call reports by listing certain mortgages as F.H.A. insured mortgages when said mortgages, in fact, were not insured were not sufficiently supported by evidence.

The Act of June 25, 1948, C. 645, 62 Stat. 750, 18 U.S.C. § 1005 states:

> "Whoever makes any false entry in any book, report, or statement of such bank with intent to injure or defraud such bank, or any other company, body politic or corporate, or any individual person, or to deceive any officer of such bank, or the Comptroller of the Currency, or the Federal Deposit Insurance Corporation, or any agent or examiner appointed to examine the affairs of such bank, or the Board of Governors of the Federal Reserve System—"

The Government charges that Ira L. Sober made false entries of F.H.A. Mortgage figures carried on the bank records. The evidence shows that four mortgages were questioned as not being F.H.A. insured mortgages. (C.A. Appendix 197a) At the inception of these four mortgages, proper F.H.A. applications were completed and the F.H.A. issued commitments. Construction was commenced and various F.H.A. inspections were completed. The evidence further shows that the commitments terminated prior to the completion of all necessary documents to have the F.H.A. issue the insurance on the mortgage.

Ira L. Sober testified that his knowledge as to F.H.A. procedures was limited, and that he was not aware that a commitment which expired on a certain date could be reinstated upon request. He further testified that the necessary documents for obtaining F.H.A. insurance were not completed within the commitment period because the contractor who was building these houses ran into financial difficulties and there were questions of whether or not liens would be filed (C.A. Appendix pp. 315a, 317a). A further problem arose because the houses were not finished on the date contemplated.

The four mortgages which were listed as F.H.A. mortgages on the books of the bank were carried as such during a period of almost five years. Throughout these years, the F.D.I.C. Examiners as well as the Pennsylvania State Banking Examiners, audited the books of the Bank at least once and generally twice a year. They reviewed the files and never questioned the correctness of these transactions.

Mr. Ira Sober was confronted with the question of where would be the correct place to list this type of mortgage on the books of the Bank. The mortgages could not qualify as conventional mortgages because the purchasers of the home (mortgagors) did not submit a down payment in the amount required to have a conventional mortgage issued. However, they did submit the required payment for an F.H.A. mortgage. The difficulty which arose was that the Mortgage originally started out as an F.H.A. mortgage, and then through the lapse of the commitment, the insurance was never issued and therefore the mortgage took the status of being neither a F.H.A. mortgage, nor a con-

ventional one. Ira L. Sober entered them as F.H.A. mortgages when he obtained the commitment (C. A. Appendix, p. 313a) and started paying out money on the construction loan and continued to carry them as such on the books of the bank throughout the five year period prior to any action being taken by the Government.

The evidence shows that the number of mortgages during these years in the F.H.A. division (16) were exceedingly small in number and amount. It would have only taken a very short time to have checked them and to find that some were not insured mortgages. Moreover, as the evidence shows, the initial F.H. A. premium in most of these four cases were found to be in the individual folders (C.A. Appendix, p. 317a). The checks themselves were never cashed nor sent to the F.H.A. There is no evidence that Mr. Ira L. Sober did this for any benefit to himself or anyone else. As a matter of fact, in one folder the cash for the F.H.A. yearly premium was found. If Mr. Sober was making false entries to deceive or defraud anybody, it would seem reasonable that he would pocket the cash himself, and secure personal gain from the commission of a criminal act. (C.A. Appendix, pp. 197a, 203a-205a, 223a, 311a-321a; See *U. S. v. Scoblick*, 124 F. Supp. 881, affirmed 225 F.2d 779) (C.A. 3rd 1955).

Two additional counts in the indictment charged Charles L. Sober, Ira L. Sober, and Jack C. Reese with false entries alleging that two F.D.I.C. call Reports contained false entries. These two counts tie in with the earlier crimes charged against Ira L. Sober because the same mortgage figures which were treated as being false entries on the bank records were posted in the Call Report and submitted to the F.D.I.C.

The evidence shows that the control accounts of the Bank are exactly in accordance with the figures submitted on the F.D.I.C. Call Reports. There was no attempt to change the figures on the Call Reports from the figures shown on the General Control Records of the Bank, and the Call Reports, therefore, only indicated the information which the basic documents of the bank reflected. (C.A. Appendix, pp. 340a-341a)

Evidence introduced as to Charles L. Sober being guilty of this crime is limited to the fact that he signed the Call Reports as an attesting witness. (C.A. Appendix, pp. 225a-226a, 341a, 342a) There was no evidence submitted that he knew that any of the figures on that Report were wrong, or that he knew anything in detail about the four transactions. As a matter of fact, the uncontradicted testimony of Mr. Sober is that he had very seldom, if ever, read the Call Reports. (C. A. Appendix, p. 241a)

The Call Report itself contains itemizations of all the transactions and accounts in the Bank. It is submitted as a matter of law that no one individual could possibly know the correctness of each and every figure on that call report, unless that individual worked on those particular figures himself. That was not the case as to Charles L. Sober. It is very interesting to note, also, that there were at least five prior call reports submitted by the Bank, showing the identical alleged false entries. (C.A. Appendix, p. 197a) Why were these two particular statements used as a basis for an indictment? The answer is rather obvious. The reason being that on all the prior reports, Charles L. Sober never signed either as an attesting witness or as an officer of the Bank. It should also be noted that four other attesting witnesses on these Call Reports, are not being charged

with any crime. Charles L. Sober did nothing more than they did in attesting the cashier's signature on these reports.

Jack C. Reese is made a defendant on these counts because he signed the Report in his official capacity as Cashier of the Bank. The only additional evidence supplied by the Government was that one of the Minutes of the Board of Directors dated in 1958 disclosed a Motion being made that one of the four mortgages be transferred over as a conventional mortgage (C.A. Appendix, p, 349a) The balance of the testimony as to Jack C. Reese's participation in this crime was to the effect that two of the Bank's cashier checks made out for the F.H.A. insurance premiums were found in the folders and reissued (C.A. Appendix, pp. 347a-348a). At that time Mr. Reese contacted Mr. Ira Sober and asked what the delay was in forwarding these checks, and was informed that there were a number of problems in completing the necessary F.H.A. requirements. That is the sum total of the evidence against Jack C. Reese. His testimony, undenied, discloses it would be a physical impossibility in the short period of time he had to make out the Report, to attempt to check into every one of the tens of thousands of accounts and recalculate the control figures (C.A. Appendix, pp. 339a, 340a). There were better than six to seven thousand checking accounts alone and Mr. Reese entered on those Call Reports the exact figures shown on the Control Accounts of the Bank. There is no dispute as to that testimony and evidence.

Ira L. Sober is listed as the third defendant on the same evidence submitted on the prior two counts as to his maintenance of the F.H.A. records. It is submitted that as a matter of law, in reviewing the evidence pre-

sented on these two charges, that the defendants were not guilty. Th evidence fails to show any intent to injure, deceive or defraud, as required by the Statute, and once again it appears that the Government has attempted to place four technical charges against the defendants in order to bolster the indictment for cumulative purposes. (C.A. Appendix, pp. 146a-167a, 197a-206a, 222a-226a)

IV.

The convictions of Jack C. Reese and Ira L. Sober under 18 U.S.C. § 1005, where it was claimed that they made a false entry on the books of The Old Freeport Bank when an item of $725.00 was carried in the cash items account for a period of six weeks were not sufficiently supported by evidence.

Ira L. Sober and Jack C. Reese were found guilty of a false entry in a case which we will refer to as the Piccoli matter. A $725 check was issued by Mr. Reese on the orders of Mr. Ira L. Sober on September 14, 1957. This check was to cover the balance of the purchase price of an automobile bought by Mr. Ira Sober from Mr. Piccoli. The remainder of the purchase price was to be paid under a Lease transaction. (C.A. Appendix, pp. 343a-344a) This was merely a bookkeeping entry satisfying the Lease that Mr. Piccoli already had with the Bank and substituting a new Lease of Mr. Ira L. Sober. (C.A. Appendix, pp. 322a-325a)

A lease was obtained through Mr. Jack, and a great deal was made of the fact that Mr. Jack never owned the automobile and therefore, this lease was "phony." Mr. Jack explained that he had signed the lease as an accommodation to Mr. Ira Sober and further that he himself had guaranteed the amount of money due under

that lease. (C.A. Appendix, pp. 168a-169a) He further testified that at the time he signed the lease, it was in blank, but he knew that the purchase price of the car was to be approximately $1,750.00, and that the final figures were not available because Mr. Ira Sober was checking into the insurance costs, the question of repairs, and the question of tires. This lease was in the bank at all times and in addition thereto the title to the automobile was in the bank vault.

At the time that the $725.00 check was issued a notation and slip was made and placed in what is called the Cash Items Account, and carried there for six weeks. At that time, during an examination by the F.D.I.C. and the Pennsylvania State Banking Department, the Cash Item was questioned and explained to the Examiners. At the suggestion of the Examiners, the lease was completed, even though the final figures had not been obtained by Mr. Ira L. Sober. (C.A. Appendix, pp. 325a-327a) Mr. Jack was consulted, and he verified his signature on the completed Lease. (C.A. Appendix p. 351a) The Government charges that the $725.00 was a false entry. Counsel for petitioners submit that as a matter of law, a Cash Item is the equivalent of cash itself, and therefore the books were not falsified. It is further submitted that in reviewing the evidence, the Government failed to prove any intent to injure, deceive or defraud, which is an essential element of a false entry charge. (C.A. Appendix, pp. 165a-171a, 191a-196a, 311a-336a, 343a-347a)

The question raised by the Government that an Executive Vice President of a Bank would make a false entry of $725.00 is practically speaking, facetious if not ridiculous under the circumstances of this case. It is

evident that the Government wanted to build a multiple-count indictment so that somewhere along the line, somebody would be convicted of something regardless of the evidence presented. *Cochran v. U. S.*, 157 U. S. 286 (1895); *U. S. v. Fish*, 24 F. 585 (CCNY 1885).

V.

Due process was violated because of the improper conduct of Government counsel; the introduction into evidence of subsequent events outside the scope of the indictment; the restriction of defense testimony; and the recanting of testimony by prime Government witnesses.

(a) The constant leading and improper questions, and highly prejudicial remarks by counsel for the Government created an atmosphere in the courtroom which deprived petitioners of a fair, just and impartial trial.

This point assumes an unusual significance because of a strongly divided Court. Judge McLaughlin, the writer of the Opinion, sings the praises of the United States Attorney who tried the case while the other two judges, though concurring in the judgment, have this to say:

"The appellations and examples which he (the United States Attorney) applied to the defendants and to their acts fall just short of that degree of impropriety as would require a new trial. (Appendix B, infra, P. 67)

In our Petition for Rehearing, we stated:

"When so many doubtful factors could have contributed to the verdict in this case, counsel for the appellants urge that the above quoted statement indicates that the majority of the Court had some

doubt whether the appellants received a fair and impartial trial. Under the circumstances, the Court should have resolved that doubt in favor of the appellants and a new trial should have been granted. . . ." Petition for Rehearing, P. 2.

The Opinion of the Court of Appeals dismisses with abruptness most of the legal points raised by petitioner and devotes a large part of the discussion to a defense of the conduct of the United States Attorney who tried the case. In this most decisive phase of the case, Judge McLaughlin, the writer of the Opinion, eulogizes the District Attorney. Chief Judge Biggs and Judge Hastie, the other two judges who heard the oral argument, disagree with Judge McLaughlin and state: (Appendix B, infra, P. 67)

". . . we cannot join with our Brother McLaughlin in praising the manner in which the United States Attorney summed up to the jury."

Judge McLaughlin outdistances the United States Attorney because he charges counsel for petitioners with creating a "steamy" atmosphere in the Court. What Judge McLaughlin failed to grasp from a cold reading of the Record was that the steam that was generated by witnesses who gave incompetent testimony on counts that should never have been included in the indictment and which were removed by the Court from the consideration by the jury, created a blinding atmosphere in the courtroom, so that it became impossible for the jury to bring in a fair and impartial verdict.

But Judge McLaughlin goes further, and says in his Opinion, (referring to counsel for petitioners): (Appendix A, infra, P. 59)

"Again printing the full sequence reveals the callous indifference of the assertion to the truth."

We take strong exception to that statement. During the entire course of oral argument, Judge McLaughlin never participated in the discussion, never asked any questions, nor made any comments. Had Judge McLaughlin stated orally what he wrote above, counsel would have had an opportunity to show wherein he was wrong. As the record stands now, the unwarranted and unfounded charge made by Judge McLaughlin stands unanswered in a Judicial Opinion. In refutation of that charge, counsel for the petitioners can only assert their reputations at the Bar and before the Courts.

This point alone may very well be cited as a valid and additional reason for reversal.

Counsel for the Government kicked off his case with his own witness in a startling and abrupt manner with obviously improper leading questions (C.A. Appendix, p. 35a), and when objections were made by counsel for the petitioners the Government Counsel, in a rather patronizing and appealing manner to the jury, answered that he was simply asking leading questions as a time saving device (C.A. Appendix, p. 111a). This was an obvious and direct play to the jury. The record is replete with continuous leading questions. Although counsel for the petitioners objected a number of times, continual objections could not be made because counsel felt, as any lawyer would, that the jury certainly would take a very grim view, thinking that petitioners were trying to conceal something. Although leading questions in themselves may be of little significance, leading questions coupled with the great number of improper actions by

counsel for the Government created an atmosphere which was highly prejudicial to the petitioners.

Counsel for the Government on frequent occasions injected comments during cross-examination of the Government's witnesses, as well as interrupting the cross-examination and asking questions himself. (C.A. Appendix, pp. 31a-32a, 37a, 41a, 48a, 49a, 51a, 52a, 55a, 79a, 89a, 114a, 115a, 121a, 122a, 138a, 139a, 191a, 212a-213a, 234a-235a, 236a, 237a, 241a, 252a, 256a, 287a-289a.)

Government counsel found it necessary to make statements in front of the jury, the sole purpose for which could only be to prejudice the petitioners. Two of the most flagrant abuses of proper trial procedure are found on Pages 106a-108a, and 268a-274a, C.A. Appendix. During the questioning of one of the Government witnesses, Government Counsel asked the witness whether or not he had given a statement to any representative of the defendant, and upon receiving an answer that he had, Government counsel, in front of the jury, stated that in the interest of justice and fairness, since he had turned over various Government witneses' statements to defense counsel, that defense counsel should now be fair and honor his request to turn over any statement given by the Government witness Devereaux. This request was made solely in an attempt to prejudice the jury in believing that the petitioners were hiding some information which was detrimental to the defendants' case. The only proper or legal purpose for requesting a statement as government counsel well knows is for impeachment purposes and the Government could not impeach its own witness. The request was patently improper and in a further effort to ingratiate himself with the jury, Government counsel, in a gesture of charity, withdrew his request.

Government counsel, during the cross-examination of Charles L. Sober, one of the petitioners, stated in question form in front of the jury that the petitioner had attempted to bribe Government witness Gustave Heyman. This occurred after Mr. Heyman testified very fully and thoroughly on direct examination and nothing was asked of him on this subject. A motion for the withdrawal of a juror was immediately made, and the Court, after some deliberation, refused the motion. Government counsel, not being satisfied, immediately after the ruling of the court, asked the same question once more and only desisted after the Court ordered no further questions of such a nature. There can be no doubt that the question asked by the Government counsel was highly improper, but to make matters worse, the identical question was asked again. This can only be considered as a purposeful act on the part of Government counsel. It is submited that this one reason alone would be sufficient to grant a new trial, and that the lower Court erred in failing to withdraw a juror.

It is extremely difficult to attempt to describe to an Appellate Court the atmosphere created by the Government's counsel. The words themselves during various questionings and outbursts and interruptions were bad enough, but the gestures made by Government counsel during this trial are not shown on the record. However, it is submitted that from the words themselves, the Court can reconstruct the words in conjunction with the various gestures made by Government counsel. The standard attack used by counsel for the Government was to summarize evidence given by a witness during questioning, stressing, of course, evidence which Government counsel felt was beneficial to his side of the

case. In effect, Government counsel himself was testifying for the witness. (C.A. Appendix, pp. 25a-27a, 70a-71a, 91a, 105a-106a, 109a-110a, 145a, 173a, 174a, 260a.)

Assuming that the entire trial had been conducted in a fair and impartial manner, a review of the closing speech to the jury must shock the sense of justice of the Court. This was the climax of all the various improper things that occurred during the trial. In a hard, cold, calculating manner, the United States Attorney resorted to passion and prejudice to convict petitioners. The personal vindictiveness of Government counsel is apparent so that "he who runs may read." In seventy-two pages of Transcript covering this speech, there are very few pages where some improper and uncalled-for remark does not occur such as that Mr. Sober was setting up his own straw-man and then throwing balls to knock it down. There is nothing in the record which would justify such comment. He stated that of course Mr. Sober was interested and should be convicted because he owned thirty per cent of the bank, and that the Certificates of Deposit only paid two and one-half per cent while the money was loaned out at six per cent. This was an attempt to indicate to the jury that there is a crime involved in Mr. Sober owning a certain amount of stock. Counsel for petitioners attempted throughout the trial to eliminate the question of the stock holding of Mr. Sober because it was evident that this would be used as a prime purpose for convicting Mr. Sober. One of the more shocking statements take place (C.A. Appendix, p. 355a) where Government counsel stated that there was a scheme where loans were deliberately authorized for an amount less than requested. There is not one scintilla of evidence in the record which would show that the

Loans Committee of the Bank deliberately made false loan authorizations. Moreover, this is not part of the charge in the indictment and this in itself constitutes reversible error. *U.S. v. Stirone*, . . . U. S. . . ., January 11, 1960.

Government counsel stated (C.A. Appendix, p. 358a) that Certificates of Deposit served two purposes: One, that Charles Sober would get his interest. This is highly improper because it is an attempt to make the jury believe that this bank was Mr. Sober's personal, private business concern and not a corporation. Government counsel misstated an extremely important fact (C.A. Appendix, p. 356a) when he said to the jury that Dr. Heineman had never seen Mr. Gallagher before the loan was made. The evidence given by Mr. Gallagher himself is directly opposite. (C.A. Appendix, p. 22a) Government counsel commented that Charles Sober was no more guilty than Dr. Heineman, and then he added the following statement: "They *hang* together." (C.A. Appendix, p. 356a-357a) The statement made by Government counsel that Charles Sober and Dr. Heineman had worked "the same pitch before" is in itself reversible error. This statement to the jury implies that Mr. Sober and Dr. Heineman are guilty of similar crimes committed prior to the present case without any evidential basis. Government counsel stated (C.A. Appendix, p. 359a) that *Charlie's angle* was to pay two and one-half per cent and get back six per cent, once again indicating that this was an individual business by Mr. Sober and that he received the difference. Government counsel then proceeds to state that Richard W. Heineman and C. L. Sober *confessed*. The use of the word "confessed" is improper, prejudicial and requires a new trial.

Government counsel states in no uncertain terms to the jury that a certain letter which was marked for

identification D-33 was a phony one, concocted by Mr. Sober in conjunction with one of the witnesses during this trial or immediately before (C.A. Appendix, pp. 359a-360a). This is a point which in itself would cause reversible error, exclusive of any other reason. There was no testimony as to this letter being false or improper. Goverment counsel had every opportunity to recall Mr. Kelosky and ask him whether it was fabricated or authentic. Government counsel did this in a manner calculated to arouse the passion and prejudice of the jury against the defendant and stated this was a "phony" piece of evidence and implied that it was perjured. Counsel for the Government once more put into the case his personal views and beliefs when he commented on testimony "I am not surprised." (C.A. Appendix, p. 306a) Government counsel stated that the chief Government witness received investigative instructions which were similar to the type he always received which was not in evidence. Government counsel stated that Mr. Canaday *could* have given a certain answer although no such answer was given by Mr. Canaday. A very interesting statement subtly made by Government counsel once again reiterates the failure of appellants to turn over statements of Government witnesses. Government counsel states that the Government gave appellants everything they asked for during the trial, implying that the appellants were hiding evidence which would be detrimental to them. (C.A. Appendix, p. 361a) The United States Attorney again stated matters which were not in evidence when he said that the other Bank Examiners who had examined the Bank in the past were not familiar with the facts. (C.A. Appendix, p. 362a) There is nothing in the evidence to support such a comment.

The final ten pages of the Transcript are indicative of the prejudice in the Government counsel's mind. Government counsel goes into a morbid, what he calls story or joke, and attempts to characterize the appellants in that light. It is important here to set forth concisely what the Government counsel related. He stated this case reminded him of a story which took place at a funeral where three individuals decided to put money in the casket of a dead friend. One man put in $10.00, another man put in $10.00, and a third man, who from his statement obviously indicates it to be one of the appellants took the $20.00 cash and put in a check for $30.00. (C.A. Appendix, p. 362a) He continues from there and compares Ira L. Sober and Jack C. Reese with a cashier who takes money out of the Bank and puts it in his pocket. Perhaps the peak of impropriety is reached when the Government counsel uses a story of armed robbery and smoking guns as analogous to the present case. Once again, this statement is inflammable and in itself constitutes reversible error. (C.A. Appendix, p. 364a) Government counsel explains to the jury what an informal loan is in his own estimation. There never was any mention of an informal loan during the trial or in the testimony of any of the witnesses. This is again an obvious effort to prejudice the rights of the petitioners in the minds of the jurors. Feeling that he might have left out something which might be beneficial in creating passion and prejudice against the petitioners, the Government counsel tells the jury that their decision is similar to "time of war decisions." (C.A. Appendix p. 365a) In addition to the above, counsel for the Government frequently characterized the appellants. The term "Old Doc" and "Good Old Doc" were used throughout the closing of the Government counsel (C.A. Appen-

dix, pp. 351a, 255a, 356a-358a, 360a) and very frequently during the trial of the case. Counsel for the Government feels that this characterization is justified because one of the appellants in testifying related a conversation wherein one of the Government witnesses used the term "Old Doc." This term was used in a sarcastic and facetious manner during the entire trial and closing. Charles Sober was not left out. During the closing, on a great number of instances, Mr. Charles Sober is referred to as "Big-Hearted Charles Sober" or which is strikingly improper "C. D. Charlie Sober." (C.A. Appendix, pp. 256a, 358a, 359a). Mr. Cypher also came in for some stinging comments from the United States Attorney in his zeal to obtain convictions. He was referred to as "Sympathetic, Big-Hearted John Cypher." The following inflammatory phrases were used during the closing, "loan-sharking," "loan shark deal." "C. D. Racket," "Blood Money" and various other terms which were extremely prejudicial and which were used purposely to arouse the passion of the jury and to obtain a conviction regardless of the evidence in the case (C.A. Appendix, pp. 358a-362a). At the close of government counsel's argument, appellants moved for withdrawal of a juror which was denied (C.A. Appendix, p. 365a).

Case law on this subject is voluminous, and appellants submit that the failure to grant a new trial is in conflict with all of the following decisions:

The required behavior of a United States Attorney in prosecuting is stated excellently in the landmark case relating to over-zealous prosecutors, *Berger v. United States*, 295 U.S. 78 (1935):

> "The United States Attorney is the representative not of an ordinary party to a controversy, but

of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor — indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

"It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." p. 88.

In a recent case, *Handford v. United States*, 249 F. 2d 295 (C.A. 5th 1957),—U. S.—(unpublished opinion) the Court of Appeals for the Fifth Circuit granted the defendants a new trial after the jury had brought in a verdict of guilty on a charge of possession on non-taxed whiskey. In that case, the United States Attorney in closing to the jury stated that too many of his friends and his friends' children get run over on the highways. In granting a new trial, the Court stated:

"A United States district attorney carries a double burden. He owes an obligation to the gov-

ernment, just as any attorney owes an obligation to his client, to conduct his case zealously. But he must remember also that he is the representative of a government dedicated to fairness and equal justice to all and, in this respect, he owes a heavy obligation to the accused. Such representation imposes an overriding obligation of fairness so important that Anglo-American criminal law rests on the foundation: better the guilty escape than the innocent suffer. In this case zeal outran fairness. The argument of the United States attorney in the district court was improper, prejudicial, and constituted reversible error."

We have stated a number of instances where Government counsel referred to matters that were not in the record. (Also C.A. Appendix, pp. 356a, 357a, 361a, 362a) The case of *United States v. Spangelet*, 258 F. 2d 338, (C.A. 2d 1958), concerned an appeal from a conviction on counts of smuggling and conspiracy. In that case, the prosecuting attorney commented that he did not make any deals with any of the witnesses. In the instant case, a statement quite similar to that is found in the summation, wherein counsel stated that he did not own or was not a member of any giant bank. (C.A. Appendix, p. 356a) A new trial was granted in the Spangelet case and the Court stated:

"It is well settled that the jury's consideration in a case should be limited to those matters actually brought out in evidence and that summation should not be used to put before the jury facts not actually presented in evidence. This doctrine is especially important in criminal trials: the prosecutor represents 'a sovereignty whose obligation is to govern impartially.'"

> ". . . and it is especially inadmissible for the prosecutor to put into issue his own professional integrity, as was done here. In United States v. Pepe, Second Circuit 247 F. 2d 838, we held it improper for the prosecuting attorney himself to take the stand to impeach the testimony of a witness." Page 342-3.

In the present case, during the Hearing on the Motion for New Trial because of newly discovered evidence, Government counsel placed his integrity before the Court in asking questions relating to alleged statements that a witness made to him and when the witness denied these statements, he offered to take the stand and testify. (C.A. Appendix, pp. 338a-389a) This type of behavior by Government counsel is patently improper and such statement by a United States Attorney would influence and be a substantial factor in the Court's decision on the Motion.

In *Beck v. United States*, 33 F. 2d 107, (8th Cir. 1929), which involved the alleged crime of using mails to defraud, the United States Attorney used the term, "robbery" during the course of the trial and such term was used in the present case. The Court stated as follows:

> ". . . A trial in the United States Court is a serious effort to ascertain the truth; atmosphere should not displace evidence; passion and prejudice are not aids in ascertaining the truth, and studied efforts to arouse them cannot be countenanced; the ascertainment of the truth, to the end that the law may be fearlessly enforced, without fear or favor, and that all men shall have a fair trial, are of greater value to society than a record for convictions." Page 114.

The case of *Read v. United States*, 42 F. 2d 636, (8th Cir. 1930) considered a bank failure and various directors and officials were being charged with misapplication of funds. In the summation to the jury, the District Attorney stated that the defendants, who were very wealthy, should have turned over their private funds to the depositors. The Court, in reversing the conviction, stated:

> "It is the duty of a prosecuting attorney to assist in giving a fair trial to a defendant. The Government cannot afford to convict its citizens by unfair means. The argument referred to was a subtle and powerful appeal to the prejudice of a jury. Counsel went outside of the evidence to convey to the jury the idea that the Reads had a fortune; that they kept it while innocent depositors suffered; . . ."

This is an answer to Government counsel's position during the entire trial when he attempted to show that C. L. Sober profited by Certificates of Deposit and stock ownership. (C.A. Appendix, pp. 206a-209a, 246a-248a, 355a)

In concluding this point, petitioners' counsel wish to cite from the Berger case, Supra, because it is felt the opinion adequately sums up the conclusion that the petitioners wish to present to this Court as to the actions of Government counsel:

> "The prosecuting attorneys argument to the jury was undignified and intemperate, containing improper insinuations and assertions calculated to mislead the jury." Page 85.
>
> "Moreover, we have not here a case where the misconduct of the prosecuting attorney was slight

or confined to a single instance, but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential." Page 89. See also Viereck v. United States, 318 U.S. 236, 1943; Ginsberg v. United States, 257 F. 2d 950, (C.A. 5th 1958); and Wagner v. United States, 263 F. 2d 877, (C.A. 5th, 1959.)

(b) *Evidence of events occurring subsequent to the time the crime was alleged to have been committed is outside the scope of the indictment and was improperly admitted in direct conflict with Stirone v. United States,* 80 S. Ct. 270.

During the course of the Government's case, testimony was elicited over objections as to events occurring six to twenty-four months after the crimes charged in the indictments. Such testimony was introduced in the Gallagher, Burkett and Heyman cases, (as well as in the Smith. Devereaux and Kelosky cases, no longer before the Court). The evidence of subsequent events so remote in time tended merely to inject more confusion into a trial which contained a multitude of witnesses and exhibits, and had no relevancy to the charges in the indictments and was prejudicial to the rights of the petitioners. (C. A. Appendix, pp. 30a-33a, 35a, 79a, 110a-120a, 126a-129a, 171a-172a, 189a-190a, 259a-260a, 264a-265a)

A recent case decided by the United States Supreme Court, *United States v. Nicholas Stirone,* 80 S. Ct. 270 (Jan. 11, 1960) originated in the United States District Court for the Western District of Pennsylvania, and was appealed to the Third Circuit. In that case, the

Government introduced evidence outside the scope of the indictment and that particular point itself was the reason that the Supreme Court reversed the conviction. It is submitted that the same error was committed in the present case and therefore, under the most recent opinion of the Supreme Court, the conviction of petitioners must be reversed.

(c) *The trial Court improperly restricted the testimony of defense witness, Allison Tarr.*

Petitioners' Richard W. Heineman and Charles A. Sober submit that the trial Court erred in denying them the right to introduce testimony by Mr. Tarr which would have shown that in the Gallagher case, Mr. Tarr was offered a $2,000 commission by Mr. Gallagher some time prior to the negotiations of the $17,000 loan with The Old Freeport Bank. Petitioners offered to prove by Mr. Tarr that Mr. Gallagher approached him before the time that he obtained the loan from The Old Freeport Bank and offered to give him $2,000 commission if he would lend Gallagher the required $15,000. The testimony was essential in the defense of Charles L. Sober and Richard W. Heineman because Mr. Gallagher testified that Charles L. Sober first suggested the amount of $2,000 as a commission. The testimony of Mr. Tarr would have enabled the jury and possibly the trial judge to rule that the conspiracy charge and the substantive charge in the Gallagher case was not sufficiently proved. Further, Mr. Tarr's testimony would have convinced the jury that Mr. Sober had nothing to do with the Gallagher transaction, and that Richard W. Heineman received $2,000 for putting his collateral in jeopardy and not as a commission for making a loan through The Old Free-

port Bank. The failure to permit such offered testimony constitutes reversible error. (C.A. Appendix, pp. 257a-259a). *Callenger v. United States*, 50 F. 2d 345 (7th Cir. 1931); *Alford v. United States*, 282 U.S. 687 (1931).

(d) *Petitioners are entitled to a new trial because three of the Government's top witnesses did not tell the whole truth.*

A short time after the trial terminated, three Government witnesses (the Burketts and Mr. Heyman), contacted the petitioners as well as counsel for petitioners, and stated that their testimony was influenced by promises or statements by F.D.I.C. officials that their property might be returned to them if the petitioners were convicted. A Motion for New Trial, based on this evidence, was presented to the trial Court and a Hearing was held on August 27, 1959, before Judge Miller, at which time testimony was taken. The trial Judge stated that he did not wish to hear the Burketts as it was his opinion that their statement did not contain information which would be of any help in determining the Motion. (C.A. Appendix, pp. 380a, 411a-412a).

Mr. Heyman was called to the stand by counsel for petitioners, and testified that during the trial, he had not told *all the truth*. During his examination and the cross-examination, he frequently stated that proposition. In cross-examination, on a number of occasions, he stated that he had told the truth earlier, but that it had not been all the truth. On that admission a new Trial should be granted.

The influencing factor in his testimony at the trial was the fact, as he later admitted, that Mr. Canaday,

the star witness for the Government, and an F.D.I.C. Examiner, had promised him that if petitioners were convicted Heyman would be in a good position to recover his property. (C.A. Appendix, pp. 367a-368a) Mr. Heyman further testified that Mr. Canaday told him he would be furnished the names of two or three lawyers who would be more than willing to help Mr. Heyman, and that such information would be furnished to Mr. Heyman at the appropriate time. Mr. Canaday took the stand and admitted that conversations took place prior to the trial and prior to Mr. Heyman furnishing Canaday a written statement, which conversations dealt with Mr. Heyman recovering his property. Moreover, Mr. Canaday admitted that similar discussions had taken place with the Gallaghers and the Burketts, prior to their furnishing statements to Mr. Canaday and prior to the time of the trial. (C.A. Appendix, pp. 382a-383a) The Government then called Mr. John D. Brown, another F.D.I.C. Examiner, who was with Mr. Canaday at the time the conversations took place with the Heymans, and although he supported Mr. Canaday's statement that no promises had been made, he left the impression in his testimony that the Heymans might have obtained the idea that their property would be returned, if a conviction were had. (C.A. Appendix, pp. 384a-385a)

Government counsel furnished the supporting evidence which necessitates a New Trial when he called Mrs. Heyman to the stand as his witness. Mrs. Heyman related the conversation which took place between Mr. Canaday, Mr. Brown and the Heymans. She stated that she was led to believe that they would obtain their property back, and when pressed in re-direct examina-

tion by Government counsel, stated that Mr. Canaday told Mr. and Mrs. Heyman that if petitioners are convicted, then the Heymans would have a good chance of recovering their property. (C.A. Appendix, p. 387a)

Counsel for petitioners submit that the trial Court erred in failing to grant a new trial. A new trial should be granted where principal Government witnesses, after a trial is terminated, state that Government agents had offered them or promised them certain future rewards if a conviction were had. This proposition is further strengthened where the witness testified that he did not tell the whole truth at the time of the trial, and this was substantiated in questioning by the trial Judge. (C.A. Appendix, pp. 389a, 412a-415a). The testimony taken at the Hearing held on August 27, 1959, reveals that a new trial should have been granted because there is some question as to the veracity of the testimony given at the time of the trial. See *U. S. v. Marachowsky*, 213 F. 2d 235. (7th Cir. 1954). United States Constitution, Amendment V.

VI.

Due process was violated because Jack C. Reese and Ira L. Sober were forced to be tried together with the other petitioners on unrelated charges.

The trial court erred in failing to grant a new trial at the close of the Government's case after judgments of acquittal were granted as to Jack C. Reese and Ira L. Sober on charges of violating 18 U.S.C. § 220 and § 371.

The indictment at Criminal No. 15664 was drawn in such a manner that all five defendants were required to go to trial together because they were all placed in

one of more counts with each other. At the conclusion of the Government's case, the trial Judge ruled that Ira L. Sober and Jack C. Reese were not involved in violations of 18 U.S.C. § 220 and § 371, and entered Judgments of Acquittal for them on said charges. (C.A. Appendix, pp. 352a-353a) Had the indictment originally excluded Jack C. Reese and Ira L. Sober from those charges, they would have been entitled to a separate trial. *McIlroy v. United States*, 164 U.S. 76 (1896), *United States v. Frankfeld*, 38 F. Supp. 1018 (D. Ct. D.C. 1941).

The law on this phase needs clarification. Where a number of defendants are tried together on multiple charges, and at the conclusion of the Government's case, some of the charges are eliminated as to some of the defendants, there occurs the problem of whether to continue the trial against all of the defendants on the remaining unrelated charges. This, in a superlative degree, is the problem in our case. Shortly after the Court of Appeals for the Third Circuit decided the instant case, the Supreme Court of the United States handed down its Opinion in *Schaffer v. United States*, 80 S. Ct. 945 (May 16, 1960). In the Schaffer case, the defendants were charged with substantive offenses as well as conspiracy. At the conclusion of the case, the conspiracy charge was thrown out by the trial court, and the case was proceeded with on the substantive charges against all of the defendants. The trial Court and the appellate Court both made a special finding that prejudice did not exist because of such a joint trial on unrelated charges, and the Supreme Court sustained them. In the case now before the Court, neither the lower Court nor the Court of Appeals made a finding that prejudice did not exist.

Further in the Schaffer case, the defendants were charged under the same section of the criminal statute while in the case now before the Court, the individual defendants were charged under different and unrelated sections of the criminal code. In a strong dissenting Opinion written by Mr. Justice Douglas and concurred in by the Chief Justice and Mr. Justice Black and Mr. Justice Brennan, it was argued that a new trial was mandatory. In the case before the Court now, the circumstances are such that we believe that even the majority of the Court in the Schaffer case would conclude that a new trial must be granted. Federal Rules of Criminal Procedure, Rule 14.

VII.

A Court of Appeals may not refuse to interpret a United States Statute where there has been a conviction under said statute and the question of the applicability of said statute is raised.

The orbit of the present case revolves around the interpretation of 18 U.S.C. § 220. The case was "bitterly" contested during a six-week trial. More than 200 exhibits were presented and more than 2,000 pages of testimony were taken. The defendants included a bank president, a vice president, a cashier, and a highly successful medical man and a businessman. None of the defendants had a past criminal record, and all of them were highly respected citizens in the communities in which they lived. Section 220 has never been interpreted by an Appellate Court in the United States on facts similar to the ones in this case where bank directors supplied personal funds as collateral, taking all the risks of the loss involved, and made a charge for taking such

a risk. Counsel for the petitioners, both in the lower and the Appellate Court, pleaded with all the force at their disposal for an interpretation of this section, and both of these Courts failed to give an adequate answer. In an attempt to have the omission corrected by the Appellate Court, petitioners requested a Rehearing wherein they specifically requested that Court to file a Supplemental Opinion interpreting that section. A Rehearing was denied. We earnestly and strongly urge upon this Court the necessity to grant the certiorari in order to give us an opportunity to argue and your Honorable Court an opportunity to clarify that section in the interests of justice so that bank officials as well as lawyers and judges in the future will understand what is prohibited by that section of the criminal code.

CONCLUSION

For the reasons set forth herein, we respectfully submit that this petition for a writ of certiorari should be granted.

ALEXANDER COOPER
MELVIN SCHWARTZ
Attorneys for Petitioners.

APPENDIX A

No. 13,041.

UNITED STATES OF AMERICA

v.

IRA L. SOBER,

Appellant

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued April 19, 1960

Before BIGGS, *Chief Judge*, and MCLAUGHLIN and HASTIE, *Circuit Judges*.

Opinion of the Court

(Filed June 24, 1960)

By MCLAUGHLIN, *Circuit Judge*.

Of the several points argued in this criminal appeal, the only one that needs any detailed anaylsis is the assertion that the United States Attorney deprived the defendants of a fair trial by highly prejudicial and inflammatory remarks in the course of his summation. However, for a sound understanding of that question it is necessary to state and dispose of the basic situations arising from the two multiple count indictments against the five appellants.

All of the appellants were either officers, directors or both of the Old Freeport Bank, Freeport, Pennsylvania. That institution's deposits were insured with the Federal Deposit Insurance Corporation. The individual

indictments charged violations of 18 U.S.C. § 220 which forbids receipt by bank officials and employees of gifts or commissions for procuring bank loans; 18 U.S.C. § 371, the conspiracy statute; 18 U.S.C. § 656 covering embezzlement by bank officials and employees; and 18 U.S.C. § 1005 which deals with the making of false entries in books or records of insured banks.

On the offenses under 18 U.S.C. §220, Heineman, a physician and director of the bank and Charles Sober, executive vice-president and a director were found guilty; the first for receiving a fee for procuring a loan to Leo Gallagher and his wife; the second for aiding and abetting the transaction. The evidence showed that Gallagher, a tavern owner, needed $15,000 to buy out his partner's interest and to renovate the premises. Sober told him that the limit of a bank loan would be nine or ten thousand dollars and referred him to Heineman for an additional loan. Heineman posted a certificate of deposit in the amount of $8,000 as collateral security for a bank loan to Gallagher of $17,000. Of the latter amount Heineman was paid $2,000 "for his trouble." Gallagher regarded the payment as a "kick-back." From more than adequate evidence the jury was entitled to find Heineman and Charles Sober guilty, as it did, not only as to the substantive crime itself but for conspiracy to commit it.

A loan to John R. Burkett and his wife followed the same pattern. These people were in serious financial difficulty. Unable to obtain a loan elsewhere, they sought a loan from the Freeport Bank. Their total obligations amounted to $5,100. Charles Sober sent them to Heineman. The latter posted a $3,000 certificate of deposit as additional security to the heavily mortgaged Burkett

home. The bank loaned he Burketts $5,900. Heineman obtained a fee out of that in the sum of $800. Here too there was solid evidence that the $800 loaned by the bank over and above the actual needs of the Burketts went to Heineman as his commission. The convictions of Charles Sober and Heineman for both the Section 220 crime and conspiracy were justified by the record.

A loan to Gustave C. Heyman and his wife by the bank in the sum of $46,000 resulted in the indictment of Charles Sober and appellant Cypher, also a bank director. There was testimony at the trial that Heyman was refused a $23,000 bank loan; that Sober referred him to Heineman as a person who might loan him the additional $10,000 over the bank limit of $13,000; that the negotiations with Heineman fell through. Later Heyman contacted Cypher who himself borrowed $10,000 from the bank. With this he bought a certificate of deposit in that sum and assigned it to the bank as further collateral security for a loan by the bank to Heyman and his wife in the amount of $46,000. Half that money was paid to Cypher and his wife by a certificate of deposit which was assigned to the bank as additional security for the loan. Heyman paid interest on the entire $46,000. Here too there was sufficient proof of Sober's tie-in to the loan and of the $23,000 certificate of deposit being payment to Cypher for obtaining the loan to the Heymans and of the conspiracy by Sober and Cypher to effectuate the result.

In the first of the false entry counts, Ira Sober, executive vice-president and a director and Reese, cashier and a director, were charged with overstating the bank's position by $725 in the general ledger with intent to injure and defraud the bank or the F.D.I.C. or

an agent or examiner appointed to examine the bank's accounts. This arose out of an arrangement by Sober to purchase an automobile from one Piccoli. The evidence indicated that Sober had Reese issue a cashier's check for $1,225 to Piccoli. The check was later ostensibly protected by a fraudulent sales agreement assigned to the bank. The proof was clear as to the falsification of the records and as the trial judge said in sustaining the convictions of Reese and Ira Sober on this count, "The evidence of intentional deceitfulness was overwhelming."

The remaining false entry counts concerned the over-statement in bank records and in two call reports to the F.D.I.C. of the outstanding balance of mortgage loans insured by the Federal Housing Administration. Proof of the overstatement was complete. Evidence of criminal intent was present as the effect of the entries was to represent the bank in better condition than it was in fact. The element of wilfulness was definitely established as a jury question. The convictions of Ira and Charles Sober and Reese under these counts were amply supported by the evidence.

This brings us to consideration of the District Attorney's summation. It came at the conclusion of a five week trial of a complex, bitterly defended group of criminal charges against five defendants. The defense attorney had talked for forty-five pages of the printed appendix. That address, while it is not at all urged by the government as a reason for any part of the prosecution's argument, does reveal unmistakably the defense tactics and the kind of steamy atmosphere in which the District Attorney of necessity spoke. For example, in the defense closing the testimony of the Gallaghers and

of Burkett was separately characterized as a "phony story." As to evidence of the federal bank examiner Canaday, the defense attorney rhetorically asked, "Why do we have to have concoctions of that kind?" And accusing Canaday of withholding evidence, he said, "Why do you keep it from the jury? It is not right, it is not fair * * *." Defense counsel told the jury a long story of a man, convicted of murder on circumstantial evidence who had served two and a half years of his ten to twenty year sentence when the person who had actually committed the crime confessed. Thorughout the defense summation, its main theme was "What is behind all this members of the jury? I'm asking this question over and over again." Towards the end of the argument counsel plainly inferred that he meant two giant banks who have "absorbed and eaten up every bank around here" and said, "I wonder how much the success of this bank has eaten into the hearts of these competitors * * *."

It was immediately following those remarks that the District Attorney made his closing argument. And it would seem he recognized that he needed his every effort to overcome prejudice, not to create it. In an affirmative, well coordinated presentation, for fifty-eight pages of the appendix, he solidly marshalled the trial evidence as to the defendants. The record was damning against them and he adhered to the record.[1]

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1. The District Attorney's final words to the jury as he left his case with that tribunal were:

> "Jury duty is one of the highest services that most citizens ever will have the opportunity to perform for their government. I don't ask you to convict anybody because I ask you to. I don't ask you to do so out of any prejudice that you might have.

Appellants insist that the District Attorney in a "hard, cold, calculating manner" resorted to passion and prejudice to convict the defendants. They ascribe to him, "personal vindictiveness." They say "The final ten pages of the Transcript contain and are indicative of the venom and prejudice in the government counsel's mind." In their zeal to attack the District Attorney at most they merely show that he prosecuted these difficult cases with earnestness and vigor. He struck hard blows but fair ones. On seven of the various counts motions for acquittal were granted. On seven more counts there

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If you have any prejudice against anybody, be they bankers, doctors or what-have-you, or even lawyers, please dismiss it from your mind, and act only on the evidence, but if you believe—if you believe that the testimony as given by the Gallaghers, by the Burketts, by Devereaux, by Mr. Heyman, and by the various other people who testified here on behalf of the government, all of which was consistent, all of which is substantiated by the books, records and documentary evidence—if you believe that, then it is your duty as good American citizens to return a guilty verdict as to each indictment and as to each count of each indictment.

"If, on the other hand you do not believe it, if you believe that all these people were not telling the truth but that instead the stories as told by Mr. Sober and Dr. Heineman can somehow be worked together—if you believe that, then of course you should acquit as to any such count.

"We only ask that you give it your serious consideration. I know you will, and return such verdict as appears to be just. If that is done then the government wins the case regardless of what the result is. We are interested only in seeing that justice be done to everyone of our citizens.

"Thank you very much."

were verdicts of not guilty. On one of the remaining counts the judge set the conviction aside. On the balance of twenty-three counts verdicts of guilty were sustained by the trial court. The District Attorney used every legitimate means to bring about just convictions and this he was bound to do by his oath. Berger v. United States, 295 U.S. 78, 88 (1935).

Appellants do not print the summations in their entirety but fortunately they are part of appellee's appendix. Thorough study of the government closing does not reveal a single instance where the District Attorney failed to live up to his high obligation.

Specifically, appellants say first, government counsel stated that Miss Cypher, daughter of appellant John Cypher, "was placed on the stand simply to gain the sympathy of the jury." They don't print the District Attorney's complete comment and they don't print Miss Cypher's testimony or that of her mother at all. It is quite enough to simply quote what the District Attorney said:

> "I was surprised to hear the rather eloquent plea for sympathy that was made, in fact that has been an undertone all through the case. That's why Mrs. Cypher was put on the stand, but imagine even young Miss Cypher was put on the stand. What for? What did she contribute to determining what the facts were in this case? That Mr. Heyman had called Mr. Cypher on numerous occasions. Mr. Heyman told you that. Mr. Cypher told you that. Nobody denied that. Mrs. Cypher told you. The young girl was put on the stand only for one purpose, to gain sympathy."

The District Attorney never impunged Miss Cypher's integrity, his expressed thought regarding it was: "Sure, Mrs. Cypher told the truth; she says he used to come in often. *Young Miss Cypher said the same thing.*" (Emphasis supplied).

Next it is complained that the government stated "that Mr. Sober was setting up his own straw-man and then throwing balls to knock it down. *There is nothing in the record which would justify such comment.*" (Emphasis supplied). Again printing the full sequence reveals the callous indifference of the assertion to the truth. The language reads:

> "Another thing I want to bring out, Mr. Sober is charged with aiding and abetting in quite a few counts. His counsel as pointed out to you numerous times Mr. Sober did not get one penny. Well ladies and gentlemen, nobody charged that Mr. Sober got any of that money. He set up his own strawman and he's very effectively throwing balls to knock it down, but we don't charge he got any of the kick-back money. We have no knowledge; we are not implying we do have, and we are not making that accusation. We are saying instead, Mr. Sober made it possible for Dr. Heineman or for Mr. Sober or Mr. Cypher to get the commission, fee or thing of value, and if he did that, under the law he is equally guilty with Dr. Heineman whether or not he got a cent."

The third claim is that the government argued "Sober should be convicted because he owned thirty per cent of the bank * * * that there is a crime involved in Mr. Sober owning a certain amount of stock." That was

not what the government said. The government stressed that since Charles Sober was charged with aiding and abetting and conspiracy with Heineman or Cypher, whether he received any money from the loans was unimportant. However, because the defense was alleging he had received nothing and constantly querying why was he accused at all, the District Attorney pointed out that Sober did also profit. He noted that Charles Sober and his brother Ira owned almost 30 per cent of the bank's stock and referring to the certificates of deposit said:

> "That certificate of deposit paid interest at two and a half per cent. A certificate of deposit means the money has to stay in the bank for three years, and except in dire circumstances, three years, it had to stay there, at two and a half per cent interest. He had to pay for the money, and he loaned the money out at six per cent, so Mr. Sober was not entirely without any gain from the entire transaction. There was something coming back to him. That is important only because—not because that is a part of the charge, it isn't part of the charge. He is charged with aiding and abetting Dr. Heineman or Mr. Cypher, but it is important because you were continually told, Charles Sober got nothing. Why was he here?"

Accusation number 4 in appellants' brief reads:

> "One of the more shocking statements take place where Government counsel stated that there was a scheme where loans were deliberately authorized for an amount less than requested. There is not one scintilla of evidence in the record which would show that the Loans Committee of the Bank deliberately made false loan authorizations. Moreover,

this is not part of the charge in the indictment and this in itself constitutes reversible error. U. S. v. Stirone, — U.S. —, January 11, 1960."

This has to do with the Gallagher episode in which Gallagher testified he asked Sober for a $15,000 loan. Sober told him, according to Gallagher, he could only give him nine or ten thousand. Sober said he told Gallagher the bank would only give him nine. Gallagher then testified that he asked Sober "Do you think, do you know anybody would want to lend out some money?" After a couple of days Gallagher saw Sober who referred him to Heineman. Gallagher following that, entered into the arrangement with Heineman above outlined. It was in referring to that whole ugly operation that the District Attorney said, "* * * he asked for fifteen. Sober says, 'We will only give you nine or ten.' That was part of the scheme. That was part of the plot." And if the government evidence was to be accepted, as the jury did accept it, Sober's handling of the loan to Gallagher was part of the plot to see that Heineman obtained a kickback of $2,000.

Appellants go on commenting regarding other things the District Attorney said in the course of his closing, none of which is more helpful to their proposition than those already cited. Taking up the final ten pages of the transcript alluded to, the initial objection is to the story of which the District Attorney stated the case reminded him. As appellants' brief puts it the "story which took place at a funeral where three individuals decided to put in $10.00, another man put in $10.00, and a third man, who from his statement obviously indicates it to be one of the appellants took the $20.00 cash and put in a check for $30.00. He (the Dis-

trict Attorney) continues from there and compares Ira L. Sober and Jack C. Reese with a cashier who takes money out of the Bank and puts it in his pocket." It seems to us that even from the scant sketching of the Ira Sober, Reese, Poccoli scheming in our opening statement, the illustration is no misfit. Another illustration by the District Attorney is assailed. What the former said was:

> "There are certain other charges that I wanted to discuss if I may. The embezzlement charges. Dr. Heineman does not deny that he got two $50 payments from the Burketts which he didn't deliver to the bank, and at that time it was the bank's money. Why? The Burketts still owed the mortgage to the bank. Now he had no right at that time to assume that the Burketts were or were not going to be able to make the payments. They were still paying; he had no right to assume that they were going to default. If the man would have been fortunate enough to get work regularly, maybe they wouldn't have defaulted, so on that day he had no right to keep that $50. What is his excuse? That later on he took the Burkett's house away from them and he paid off the note. See, he had the deed. He took the Burkett's house and paid the note. Naturally that included the two $50 payments that hadn't been paid before; but he took two $50 payments and admits it. He admits it. The only thing he says, 'I paid it back.'"

> "If a robber coming out of one of the downtown banks with a sack of money in his hand and a smoking revolver, would run into our good friends Mr. Puddister and Mr. Huigens who would identify

him, and he would say, 'Here's the money back, I'm sorry I did it,' that wouldn't make it any less a bank robbery, would it, and it wouldn't make him less a bank robber if the man said, 'I've only had the money for two minutes.' It would still be a robbery, and it is still an embezzlement whether or not it was paid back, and as the money Ira received from Mr. Paz and paid back some weeks later. That too, that caused a false entry in the bank, because it was not reported as having been received."

It is immediately seen that the reference on oral argument to the robber and the smoking gun was taken out of context and given a connotation not in the summation itself and impossible to draw from the complete statement to the jury. It is the latter which concerns us. Every defendant is of course jealously protected against inflammable statements, against prejudicial statements not based upon the evidence or fair and reasonable deductions from it, which latter include, as Judge Learned Hand said, "oratorical conceit or flourish and in illustrations and metaphorical allusions." DiCarlo v. United States, 6 F.2d 364, 368 (2 Cir. 1925). But this was no foul blow by the District Attorney. As he gave his example to the jury, it was an apt comparison that he made. He was not trying to have the defendants found guilty of bank robbery with a gun. He was sharply demonstrating that though the jury might believe Heineman, when he said that after taking two fifty dollar payments from Burkett he later paid them back, Heineman was still guilty of embezzlement under the facts. And that Ira Sober, paying back some weeks later the bank's money he had received from Paz, a bank employee, did not wipe out his initial offense. Just

as a person who robbed a bank and returned the stolen money two minutes later continued to be guilty of his original crime.

Neither the above analogy or the story were challenged either at the time delivered or thereafter. The only objections to the government closing argument appear in the footnote.[2] And it might be here noted, though it applies to the whole trial, that appellants' attorney concluded his argument to the jury by saying: "I want to take this occasion to thank you, Mr. Teitelbaum and all his crew and this Court for the wonderful treatment we have received during the time we were here. Thank you."

2.

"Mr. Schwartz: Counsel for the defendants request the court to withdraw a juror on the basis that throughout the argument by counsel for the government certain terms were used in an effort to prejudice the rights of the defendants in the eyes of the jury.

A number of these terms are 'Stories,' 'Loan sharking,' 'Old Doc,' 'Bighearted Cypher,' 'Sharking a loan,' 'C.D. Racket,' 'C.D. Charley Sober,' 'Blood money,' together with other terms not enumerated herein, and statements concerning what Mr. Canaday could have testified but didn't in regard to—you better say what they are.

Mr. Cooper: In regard to 'Correct' and 'Attest' statements, statements by Mr. Teitelbaum, concerning the legal significance and time elements of mechanics liens, and statements as to who this examiner was who questioned Ira Sober and Jack Reese, which examiner was identified in the case as F.D.I.C. Examiner Brown.

The Court: Motion is denied."

Other objections against the last ten pages of the transcript include reference to Heineman as "Old Doc". This is criticized but that very expression was brought into the trial by appellant Charles Sober. The latter was called "Big-Hearted Charles Sober" and "C.D. Charlie Sober". The man who engineered the fantastic deal whereby Gustave Heyman was loaned $23,000 and paid interest on $46,000, the balance going to him was called "Big Hearted John Cypher". The transactions recounted were described as "loan-sharking", "loan shark deal", "C.D. Racket" and "Blood money".[3] Those terms were abrasive but were no wild appeals to prejudice; they had support in the evidence unfolded of the wretched deals in which the respective appellants involved the particular unfortunate loan applicants.

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3. The phrase "blood money" appears in the following sequence:

> "Now the evidence seems clear in this case that in each instance the loans were purposely made too low, but if that hadn't happened still there should be no commission or kickback to an officer or director for procuring a loan. People should be able to walk into a bank and either get a loan on their security or if their security isn't good enough, they shouldn't get it, and there should be no deals made whereby the president of a bank sends prospective debtors, people wanting loans, to the vice president, who agrees that he will do something to get the loan in return for $2000, $800, $2600, or $23,000. It is important that this kind of thing not be done. It is against the law to do it, and it is against the law to do it whether you put up as security one of these certificates of deposit, whether you put up cash as security, whether you endorse a note as security, or whether you just pure use your influence. However, whatever technique or manner the officer or director uses to get that blood money, it is against the law, and it should be against the law."

We have examined appellants' other points i.e. questions and remarks of the District Attorney other than at closing; manner in which the government presented its evidence; evidence allegedly improperly admitted; restriction of Tarr testimony; allegations re testimony of the Burketts and Mr. Heyman. Regarding all of these, a close examination of the voluminous record convinces us that no substantial error has arisen out of this trial because of them.[4]

The judgment of the district court will be affirmed.

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4. The district judge who conducted this long trial so admirably had this to say regarding it in his opinion denying a new trial:

> "The remaining objections which we shall consider deal with the conduct of government counsel. Defendants contend they were thereby deprived of a fair trial. But we think the trial was conducted fairly, ably and with courtesy on both sides. There were some lapses from decorum but only such as were bound to crop up in a long, tiring trial such as this was. Government counsel did ask many leading questions as he is charged with doing but liberality was also shown to defense counsel. The subject matter of the evidence made leading questions unavoidable.
>
> "The sharpest attack is made on the closing address of the United States Attorney. We do not intend to depart from the principle that statements of counsel not based on evidence which tend to influence the jury by an appeal to passion or prejudice will not be countenanced. However was have examined the record of the evidence and of the speech and conduct of government counsel and find no impropriety which justifies a new trial."

APPENDIX B

BIGGS, *Chief Judge*, with whom HASTIE, *Circuit Judge*, joins, concurring.

Though we concur in the ruling that the judgments of conviction against the defendants must be affirmed we cannot join with our Brother McLaughlin in praising the manner in which the United States Attorney summed up to the jury. The appellations and examples which he applied to the defendants and to their acts fall just short of that degree of impropriety as would require a new trial. It is true that the summation of the defendants' counsel was such as to offer a temptation to rebut in kind but the prosecuting attorney should not have succumbed to such a temptation. Cases brought on behalf of the United States should be conducted with a dignity worthy of the client. This is particularly true where a jury is present and an individual is on trial on a criminal charge. It is the duty of the trial judge to make sure by the ample means at his disposal, whether citation for contempt or some less drastic expedient, that the trial is conducted with due propriety by both prosecutor and defense counsel.

A True Copy:

Teste:

Clerk for the United States Court of Appeals for the Third Circuit.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,037

UNITED STATES OF AMERICA
v.
CHARLES L. SOBER, Appellant

On appeal from the United States District Court
For the Western District of Pennsylvania

Present: BIGGS, Chief Judge, and McLAUGHLIN and HASTIE, Circuit Judges.

Judgment

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

Attest:
IDA O. CRESKOFF
Clerk

June 24, 1960

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,038

UNITED STATES OF AMERICA
v.
RICHARD W. HEINEMAN, Appellant

On appeal from the United States District Court
For the Western District of Pennsylvania

Present: BIGGS, Chief Judge, and MCLAUGHLIN and HASTIE, Circuit Judges.

Judgment

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

Attest:
IDA O. CRESKOFF
Clerk

June 24, 1960

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,039

UNITED STATES OF AMERICA
v.
JOHN E. CYPHER, Appellant

On appeal from the United States District Court
For the Western District of Pennsylvania

Present: BIGGS, Chief Judge, and McLAUGHLIN and HASTIE, Circuit Judges.

Judgment

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

Attest:
IDA O. CRESKOFF
Clerk

June 24, 1960

Judgment.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,040

UNITED STATES OF AMERICA
v.
JACK C. REESE, Appellant

On appeal from the United States District Court
For the Western District of Pennsylvania

Present: BIGGS, Chief Judge, and McLAUGHLIN and

Judgment

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

Attest:
IDA O. CRESKOFF
Clerk

June 24, 1960

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,041

UNITED STATES OF AMERICA
v.
IRA L. SOBER, Appellant

On appeal from the United States District Court
For the Western District of Pennsylvania

Present: BIGGS, Chief Judge, and MCLAUGHLIN and HASTIE, Circuit Judges.

Judgment

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

Attest:
IDA O. CRESKOFF
Clerk

June 24, 1960

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,037
UNITED STATES OF AMERICA
v.
CHARLES L. SOBER, Appellant
No. 13,038
UNITED STATES OF AMERICA
v.
RICHARD W. HEINEMAN, Appellant
No. 13,039
UNITED STATES OF AMERICA
v.
JOHN E. CYPHER, Appellant
No. 13,040
UNITED STATES OF AMERICA
v.
JACK C. REESE, Appellant
No. 13,041
UNITED STATES OF AMERICA
v.
IRA L. SOBER, Appellant

Upon consideration of the motion by appellants to extend the time for filing a petition for rehearing in the above cases,

It is ORDERED that the time for filing a petition for rehearing be, and it is hereby extended to July 18, 1960.

McLAUGHLIN
Circuit Judge

June 30, 1960

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 13,037 — 13,041

UNITED STATES OF AMERICA

v.

CHARLES L. SOBER, et als., Appellants.

SUR PETITION FOR REHEARING

Present: BIGGS, Chief Judge, and McLAUGHLIN and HASTIE, Circuit Judges.

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

By the Court

McLAUGHLIN
Circuit Judge

Dated: July 22, 1960